INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	5
Argument	8
Conclusion	11

CITATIONS

Cases:

Boren v. *Tucker*, 239 F. 2d 767	10-11
Civil Aeronautics Board v. *Hermann*, 353 U.S. 322	9
DeMasters v. *Arend*, 313 F. 2d 79, petition for certiorari dismissed, 375 U.S. 936	8
Magnus, Mabee & Reynard, Inc., In re, 311 F. 2d 12, certiorari denied, 373 U.S. 902	11
Okla. Press Pub. Co. v. *Walling*, 327 U.S. 186	9
Siegel v. *Tyson*, 331 F. 2d 604	11
United States v. *Morton Salt Co.*, 338 U.S. 632	9

Statutes:

Internal Revenue Code of 1954:	
Sec. 7601(a) (26 U.S.C. 1958 ed., Sec. 7601(a))	2, 8
Sec. 7602 (26 U.S.C. 1958 ed., Sec. 7602)	3, 8, 9

Miscellaneous: Page

Statement of Organization and Functions, Treasury Department Publication No. 383, Sec. 1118.6 (1964 C.C.H., par. 5988) 10

Treasury Regulations on Procedure and Administration, Sec. 301.7602-1 (26 C.F.R., Sec. 301.7602-1) 3-4, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 434

JACKSON L. BOUGHNER, PETITIONER

v.

PAUL W. TILLOTSON, Special Agent,
Internal Revenue Service

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. 7-11) is reported at 225 F. Supp. 45. The opinion of the court of appeals (Pet. App. 1-5) is reported at 333 F. 2d 515.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1964. A petition for rehearing was de-

nied on July 20, 1964. The petition for certiorari was filed on August 26, 1964. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether, in support of its investigation into the tax liabilities of an unknown taxpayer, the Internal Revenue Service could issue a summons to the person who has transmitted to the Service a check of over $215,000 on behalf of the taxpayer.

2. Whether a special agent is authorized to issue an Internal Revenue summons in support of his investigation into a taxpayer's correct tax liabilities, when such investigation might conclude with a recommendation for criminal prosecution.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.
>
> (a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.
>
> * * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be revelant or material to such inquiry.

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

Sec. 301.7602-1 *Examination of books and witnesses.*

(a) *In general.* For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax (including any interest, additional amount, addition to the tax, or civil penalty) or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, any authorized officer or employee of the Internal Revenue Service may examine any books, papers, records or other data which may be relevant or material to such inquiry; and take such testimony of the person concerned, under oath, as may be relevant to such inquiry.

* * * *

(c) *Persons who may issue summons.* The following officers and employees of the Internal Revenue Service are authorized to issue a summons pursuant to sections 6420(e)(2), 6421(f)(2), and 7602—

* * * *

(4) Intelligence: Director; assistant director; assistant regional commissioners; executive assistants to assistant regional commissioner; chiefs, Review and Conference Staff; reviewer-conferees; chiefs and assistant chiefs of divisions, branches and sections; group supervisors; and special agents of the national, regional and district offices.

* * * *

STATEMENT

On October 12, 1962, Special Agent Paul W. Tillotson served an Internal Revenue summons on petitioner (R. 6-7).[1] The summons was captioned "In the matter of the tax liability of John Doe, the unknown taxpayer, or taxpayers, on whose behalf Jackson L. Boughner delivered to the Internal Revenue Service a cashier's check for $215,499.95, dated July 27, 1961 and drawn on the LaSalle National Bank, Chicago, Illinois" (R. 6). It called for Boughner to appear before Special Agent Tillotson on October 23, 1962, and give testimony regarding the tax liability of the above-described taxpayer (R. 6). This date was extended by agreement to October 25, 1962, at which time Boughner appeared, with his attorney, and refused to comply with the summons (R. 4, 10). The hearing was continued to January 15, 1963, at which time petitioner gave his name and address, but refused to comply further with the summons (R. 4-5, 11). These refusals were predicated upon the objection that the summons was illegal and invalid (R. 30).

This action was commenced on August 27, 1963, when a petition (R. 2-5) to enforce the summons was filed in the United States District Court for the Northern District of Illinois (R. 1). The petition alleged, in pertinent part, that the District Director received a letter (R. 12-13) signed by petitioner, dated July 27, 1961, containing a cashier's check for

---

[1] "R." references are to the appendix to petitioner's brief filed in the court of appeals.

$215,499.95, payable to the Internal Revenue Service (R. 3), and stating that the check was to cover additional amounts due from an unnamed taxpayer for some past years (R. 3, 12). The petition recited that, after receipt of this letter, Agent Tillotson was assigned to investigate the nature of the indebtedness disclosed by the letter, and he issued the instant summons in furtherance of that investigation (R. 4). The petition alleged petitioner's failure to comply with the summons, and closed with a prayer that the court enforce the summons by ordering petitioner to comply upon pain of contempt (R. 4-5).

Petitioner filed his answer (R. 9-12) on September 23, 1963 (R. 1). He alleged that the summons was invalid, in that it was not issued for any of the purposes authorized by Section 7602 of the Internal Revenue Code of 1954, and prayed that the petition be dismissed.

The case was heard on September 27, 1963 (R. 1, 13-24). Agent Tillotson testified that in March, 1962, he was assigned to investigate the taxpayer, upon whose behalf petitioner had sent the letter and check to the Service, to ascertain his name, the years involved, and any other information pertinent to the filing of tax returns (R. 15-16); that he interviewed petitioner on March 8, 1962, at which time petitioner stated that he did not know who the taxpayer was, the years involved, or even if the taxpayer was an individual or a corporation (R. 16); that petitioner would not reveal the name of the person who gave him the check to send to the Service (R. 18); and that

the agent then served the summons to determine whether or not a tax return had been filed by taxpayer, what years were involved, the liability as shown in the return, and whether that liability was correctly computed (R. 18-19).

On cross-examination, he testified that, while part of his duties as a special agent is to investigate alleged criminal violations of the Code, it is also part of his function to determine tax liabilities, i.e., whether tax has been paid on all income, and identify income and sources of income (R. 20-21); that he was primarily interested in learning taxpayer's name, ascertaining whether the correct amount of tax has been paid, and determining whether there might be any criminal liabilities (R. 23); and that evidence of a criminal violation might be uncovered as a result of this investigation, in which event it would be Agent Tillotson's function to recommend concerning possible criminal prosecution (R. 23, 24).

The district court ordered (R. 24-25) compliance with the summons, holding (Pet. App. 9-11; R. 27-29, 31) that the issuance of the summons was authorized and that Special Agent Tillotson was authorized to issue it. The court of appeals affirmed (Pet. App. 1-5). It held that the summons was properly issued in furtherance of an investigation into the tax liability of a designated, if unknown, taxpayer (Pet. App. 3), and that a special agent is authorized to issue a summons "to learn * * * whether the correct tax had been paid and whether there are any fraud penalties, criminal or civil" (Pet. App. 5).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 5-6, 8-9, 10) that the instant summons was not authorized because the name of the taxpayer is unknown. The court of appeals, in rejecting this very argument, held (Pet. App. 3):

> Defendant has been summoned to testify concerning a taxpayer who paid a large sum of money, purportedly covering his tax liability. That his name and whereabouts are not known does not discount the fact that *a* taxpayer exists whose tax liability the Internal Revenue Service has statutory authority to investigate.

Section 7601(a) of the 1954 Code, *supra*, p. 2, charges the Secretary or his delegate to send agents "to proceed, from time to time, through each internal revenue district and *inquire* after and concerning all persons therein who *may be liable* to pay any internal revenue tax" (emphasis supplied). As the court of appeals held (Pet. App. 2-3), Section 7602 of the Code, *supra*, p. 3, gives the Service broad discovery powers to further these investigations. *DeMasters* v. *Arend*, 313 F. 2d 79, 86-87 (C.A. 9th), petition for certiorari dismissed, 375 U.S. 936.

The cases upon which petitioner relies (Pet. 8) are clearly not in point, for, as petitioner himself admits (Pet. 9):

> In all of these cases the power of the summons was invoked to learn the identity of persons *who were not currently under investigation* and in all of these cases that power was limited by the court. [Emphasis supplied.]

The trial court correctly found (Pet. App. 10) that the Commissioner is not engaged in a mere fishing expedition in the case at bar.[2] As the court of appeals pointed out (Pet. App. 4):

> Here, the tax liability of the person who sent a check for a substantial sum to the Service, purportedly to pay his taxes, is under investigation. Defendant has been summoned to testify concerning *that specific taxpayer's liability.* [Emphasis supplied.]

2. Equally without merit is petitioner's contention (Pet. 6-8, 9-11) that a special agent cannot issue an Internal Revenue summons in support of a criminal investigation.

A special agent is specifically empowered to issue a summons as the Secretary's delegate. Section 7602, Internal Revenue Code of 1954; Treasury Regulations on Procedure and Administration (1954 Code), Section 301.7602-1(c)(4), *supra*, p. 4. According to Agent Tillotson's undisputed testimony, he was assigned to investigate to learn taxpayer's name, the years covered by the check, whether the correct tax has been paid, and whether there might be any fraud penalties, criminal or civil, involved. The subject summons was served to further his investigation. To be sure, if evidence of a criminal violation were un-

---

[2] Even if he were, this Court has repeatedly held that it is permissible to use the administrative, as opposed to the judicial, subpoena power to engage in general investigations. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641-643; *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 216; *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322.

covered, it would then be his duty to recommend possible criminal prosecution. But it does not follow that the investigation is criminal, as petitioner contends (Pet. 5). It is, rather, an investigation, being conducted by a special agent, into possible civil or criminal tax liability. Petitioner's contention to the contrary is premised on the incorrect assertion, specifically rejected by both courts below (Pet. App. 4-5, 11), that a special agent's sole function is to investigate criminal liability. The flaw in the premise is reflected in the description of the functions of the Intelligence Division in the Statement of Organization and Functions, Treasury Department Publication No. 383, Section 1118.6(2) (1964 C.C.H., par. 5988),[3] which includes the assertion of civil penalties, and in the Treasury Regulations on Procedure and Administration (1954 Code), Section 301.7602-1(a), *supra*, p. 4, which authorize the issuance of a summons for use in determining civil penalties and list "special agents" among those who may issue it.

The decision reached in this case was correct and in accord with all other pertinent decisions. *Boren* v.

---

[3] Statement of Organization and Functions, Treasury Department Publication No. 383 (1964 C.C.H., par. 5988):

1118.6 *Intelligence Division.* * * *

(2) The Division evaluates allegations and indications of tax law violations and determines investigations to be undertaken. It makes recomendations as to the disposition of cases investigated, including recommendations of criminal prosecution, and the assertion of civil penalties. It provides assistance to U. S. Attorneys and the Regional Counsel in the trial of cases. The Intelligence Division consists of groups of special agents.

Tucker, 239 F. 2d 767, 772-773 (C.A. 9th); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2d), certiorari denied, 373 U.S. 902; *Siegel* v. *Tyson*, 331 F. 2d 604 (C.A. 5th).[4] Both district court cases upon which petitioner relies (Pet. 10) are distinguishable; the summonses there involved were issued after the taxpayer had been indicted.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOHN B. JONES, JR.,
Acting Assistant Attorney General.

JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

SEPTEMBER, 1964.

---

[4] Although the *per curiam* opinion in the *Siegel* case does not set forth the facts, it involved the same challenge to an Internal Revenue summons issued by a special agent as the instant one. The Fifth Circuit found this contention to be so plainly lacking in merit that it affirmed from the bench.

☆ U. S. GOVERNMENT PRINTING OFFICE 1964 744792 243